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IN THE

Supreme Court of the United States

No. 668.

ROBERT B. FENNELL, *Petitioner*,

v.

JULES S. BACHE, ET AL, Trading as J. S. BACHE & COMPANY, *Respondents.*

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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OPINIONS BELOW.

The district judge handed down no opinion. The opinion of the United States Court of Appeals for the District of Columbia has not yet been reported. It will be found in the record at pages 28 to 32.

JURISDICTION.

The opinion of the United States Court of Appeals for the District of Columbia was filed on June 30, 1941.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (43 Stat. 938)

STATEMENT OF THE CASE.

The petitioner filed a complaint charging false imprisonment against the Washington Hotel, J. S. Bache & Company (a corporation), the District of Columbia, Melvin C. Hazen, certain police officers and an unnamed defendant (Page 1 of the Record). The process was directed to "J. S. Bache & Co., a corporation", and the return of service of the United States Marshal stated that service had been made on J. S. Bache & Company, served Mr. L. B. Brubaker, co-manager, personally, January 2, 1940.

Counsel appeared specially for the purpose of moving to quash the service of process and return (Page 5 of the Record) on the grounds of misnomer, in that J. S. Bache & Company was not a corporation but a co-partnership; that the process should have been directed to and served upon the partners individually; and that the alleged service on Mr. L. B. Brubaker as co-manager was ineffectual as he was not one of the co-partners comprising the partnership. The District Court granted this motion (Page 9 of the Record).

Thereafter, petitioner filed an amended complaint (Page 10 of the Record) in the caption of which he named, amongst other defendants, "J. S. Bache & Co. (a partnership) L. B. Brubaker, Resident Mgr." In the body of this amended complaint, petitioner named the component members of the partnership, setting forth their residence and business addresses. The process was directed in accordance with the caption and the return of service by the United States Marshal stated that service had been made on J. S. Bache & Company (a partnership) by serving L. B. Brubaker, Resident Manager, personally.

Counsel again appeared specially for the purpose of moving to quash the service of process and return (Page 14 of the Record) on the grounds that the process should have been directed to and served upon the partners individually, and not directed to and served upon a person who was not a member of the partnership but only an employee. The District Court granted this motion (Page 18 of the Record),

whereupon petitioner moved for reconsideration (Page 19 of the Record), which motion was denied (Page 23 of the Record).

QUESTION PRESENTED.

The sole question involved in this petition is whether jurisdiction over a partnership composed of non-resident partners can be acquired in an action in personam by service of process on a resident manager of an office maintained by the partnership in the District of Columbia under Rule 4(d)(3) of the Rules of Civil Procedure.

SUMMARY OF ARGUMENT.

The argument of respondents is summarized as follows:

1. That Rule 4(d)(3) of the Rules of Civil Procedure does not change the law in the District of Columbia requiring personal service of process on the members of a partnership unless a partnership can be sued in a common name.

2. That the common law rule that a partnership could not be sued as such, but that the partners had to be joined individually in a suit and personally served with process is the law in the District of Columbia as stated in *Matson* v. *Mackubin* (61 App. D. C., page 102).

3. That the necessity for personal service on the members of a partnership in the District of Columbia has not been affected by the Rules of Civil Procedure in light of Rules 17 (B) and 81 (E) of the Rules of Civil Procedure.

4. That the Court of Appeals properly affirmed the order of the District Court denying reconsideration of its order quashing service of process directed to and served upon the resident manager of a non-resident partnership.

ARGUMENT.

The respondents contend that the new Rules of Civil Procedure do not change the law in the District of Columbia insofar as suits against a partnership are concerned with respect to the necessity for personal service on the partners. The rule in question, No. 4(d)(3), provides that service shall be made as follows:

> "Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

The meaning of the language of the rule is clear and unambiguous in that it describes the manner of service of process "upon a partnership or other unincorporated association which is subject to suit in a common name". The question of the applicability of the rule to this case then devolves upon the query as to whether a partnership is subject to suit in a common name in the District of Columbia.

It is settled in general law that in the absence of statute partners cannot be sued in the firm name, but that a suit against members of a partnership like a suit against several individuals requires service upon the individual defendants.

> "At common law there was no means of suing or of obtaining judgment against a partnership as such, and it was necessary that the members of the partnership should be individually served with process." (20 Ruling Case Law, Page 936.)

In the District of Columbia, the Court of Appeals held in the case of *Matson* v. *Mackubin* (61 App. D. C., Page 102) that the common law rule as to suits against a partnership prevails in the absence of statute, and that the Code

of Laws for the District of Columbia contains no provision changing the common law rule. In that case, the question involved was quite similar to the one at hand in that the action was in personam against a partnership composed of non-resident partners, and the plaintiff sought to obtain jurisdiction over the partnership by service of process on the manager of an office maintained in the District of Columbia by the partnership. The decision of the lower court quashing the service of process and return on the resident manager of the partnership was affirmed, the Court stating in its opinion as follows:

> "There is no local statute in force in the District of Columbia authorizing such a service as was here attempted. Section 1537, D. C. Code (D. C. Code 1929, Title 24, Section 373) provides that, in actions against foreign corporations doing business in the District, all process may be served on the agent of such corporation or person conducting its business, and such service shall be effectual to bring the corporation before the court. That section, however, does not apply to partnerships, nor is such a provision to be found elsewhere in the Code."

The Court of Appeals cited in its opinion the case of *In re: Grossmayer*, 177 U. S., Page 50, in which service of process was made on a local agent of R. G. Dun & Company, a non-resident partnership. The petitioner contended that defendants were an "association" within the meaning of a Texas statute providing that process could be served on any local agent within the State. A subsequent section required service on partnerships to be made by serving one of the firm. The Court said:

> "But the Circuit Court rightly held that it had no jurisdiction to enter judgment against defendants, because there had been no lawful service of the summons upon them. It appears by the record, and is not now denied by the petitioner, that the defendants were a partnership. In the absence of local statute, no valid judgment can be rendered against the members of a partnership without service upon them."

The Court cited in its opinion the case of *D'Arcy* v. *Ketchum,* 11 Howard, P. 165, in which this Court held that a judgment of a New York court against a non-resident partner who had never been served with process in the suit was not entitled to full faith and credit in Louisiana.

In view of the decision in *Matson* v. *Mackubin* and in the absence of any statutory change since with respect to suits against partnerships, the petitioner should have complied with the definition of process necessary for compelling the respondents' appearance in this suit under Title 24, Chapter 15, Section 371 of the D. C. Code. It is respectfully submitted that petitioner made no effort to comply with such requirements, and, in the case of *The New York Continental Jewell Filtration Company* v. *Karr* (31 App. D. C., Page 465) the Court of Appeals for the District of Columbia said:

> "Statutes providing a method of service of process for the purpose of bringing individuals or corporations into Court must be strictly followed, and the Court is powerless to declare a service of process valid where there has not been a strict compliance with requirements of the statute."

The petitioner contends that the Rules of Civil Procedure have changed the law in the District of Columbia with respect to suits against partnerships and the process necessary to bring the partners within the jurisdiction of the court. It is respectfully urged that while a court may promulgate rules making procedural changes, it cannot deprive a defendant of a substantive right by the adoption of a new rule.

In the case of *Doherty* v. *Kalmbach* (66 App. D. C., Page 322), the Court in construing a rule of court on the mode of service of process said:

> "It is elementary that in a civil suit in personam jurisdiction over the defendant implies among other things either voluntary appearance or legal service of process; but there is a distinction between the necessity

for valid service of process—which is jurisdictional—and the manner of service of process—which is procedural. Citing Sewchulis v. Lehigh Valley Company (C. C. A. 2) page 522, 17 L. Ed., page 180; Amy v. Watertown, 130 U. S., page 301; Shepard v. Adams, 168 U. S., page 618; J. E. Petty & Company v. Dock Company (C. C. A.) 283 Fed., page 341. In these cases it is held that the mode or manner of serving process comes under the category of practice and procedure which is not jurisdictional."

The Rules of Civil Procedure do not dispense with the necessity for valid service of process on these respondents. It is respectfully submitted that such a jurisdictional change could only be made by statute, provided such statute did not contravene the Constitution.

It is respectfully urged that the authority given this Court to promulgate general rules under Act of Congress of June 19, 1934, (c. 651, 48 Stat. 1064; U. S. C., title 28, section 723 c) was limited in these words:

"Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant . . ."

When this Court adopted the Rules of Civil Procedure, it was not their intent or purpose to change the substantive rights of litigants. The Court was adopting rules for use in the Federal Courts that were functioning in the various States and in the District of Columbia. As to the question here involved of whether Rule 4 (d) (3) changed the common law rule that had been the law in the District of Columbia with reference to suit against and service upon partnerships, the true intention is reflected not only in the language of the rule itself, but also in Rule 17 (b) which provides:

"Capacity to sue or be sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under

> which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

The language of Rule 17 (b) is clear and unambiguous in defining the capacity to sue or be sued as being determined by the "law of the state in which the district court is held". The exception that is made with respect to partnerships or other unincorporated associations which have no capacity under the law of the state to sue or be sued in their common name, provides that they may sue or be sued in their common name for the purpose of enforcing for or against them a substantive right existing under the Constitution or laws of the United States.

The query now resolves to the meaning of the phrase "the law of the state in which the district court is held". Again this Court carefully defined its meaning and intent in Rule 81 (e) which provides:

> "Law Applicable. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the District Court of the United States for the District of Columbia. When the word 'state' is used, it includes, if appropriate, the District of Columbia. When the term 'statute of the United States' is used, it includes, so far as concerns proceedings in the District Court of the United States for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word 'law' includes the statutes of that state and the state judicial decisions construing them."

Therefore, the law in the District of Columbia as construed by the Court of Appeals in the case of *Matson* v. *Mackubin* is the law applicable under the Rules of Civil Procedure.

The only other question remaining for determination is whether the petitioner has a substantive right under the Constitution or laws of the United States to come within the exception under Rule 17 (b). It is respectfully suggested that petitioner's cause of action is a common law tort action purely local in character and that no substantive federal right is involved.

The petitioner's reasons for granting the writ of certiorari are not sound in view of the clear and unambiguous language of the Rules of Civil Procedure in which no such service of process as was here attempted is authorized. There is no novelty in the question in that this Court has already spoken through the Rules of Civil Procedure, and the language employed needs no further construction or determination by this Court. The third reason advanced is due to petitioner's failure to select a proper forum for the trial of his right, if any, before the statute of limitations had run.

CONCLUSION.

It is respectfully submitted that the District of Columbia Court of Appeals properly affirmed the denial of the district court to reconsider its order quashing the process and return of service thereon.

Respectfully submitted,

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